COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Hearing Officer Notice Soliciting Comments on Whether the Department Should Open an investigation to Establish an Instate Universal Service Fund	DTE 03-45

INITIAL WRITTEN COMMENTS OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

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Introduction

AT&T Communications of New England, Inc. ("AT&T") respectfully submits these initial comments pursuant to the Department of Telecommunications and Energy ("Department") notice soliciting comments in the above captioned proceeding, issued May 29, 2003, ("*Notice*"). Pursuant to the *Notice*, the Department seeks comment in response to a March 5, 2003, Petition ("Petition") from Richmond Connections d/b/a Richmond Networx ("Richmond Networx") requesting that the Department institute a proceeding to investigate the establishment of a Universal Service Fund ("USF") for the Commonwealth. Specifically, the Department has requested interested parties to file comments regarding: (1) whether the Department has sufficient statutory authority under existing federal and state statutes to establish a USF for the Commonwealth; and, if so, (2) whether the Department should initiate an investigation into the establishment of a USF for the Commonwealth.[1]

For the reasons stated herein, the Department should indeed open an investigation into the establishment of a state USF. Nothing in federal law preempts the Commonwealth's sovereign right to regulate the retail rates of telecommunications carriers to achieve its stated goal of universal service. Indeed, under Section 254 of the Communications Act of 1934, as amended ("Act"), Congress has expressly preserved state authority in this important area. Moreover, the General Court has delegated its authority to regulate rates to the Department, and it is well established that such authority includes the authority to set rates and charges paid by retail customers in furtherance of the goals of universal service. The Department has in the past established rates for existing services that include a component necessary to fund universal

[1] *Notice*, at 2.

service needs. There is no reason that the Department cannot instead establish the rate component as a separate rate element.

As the Department confirmed in its *Notice*, this issue is ripe for consideration. Indeed, the issue of establishing an in-state universal service fund, in conjunction with the transition of Verizon's rates, including access charges, to economically rational levels, has been raised on several occasions, as it is fully consistent with the Department's long-standing goals of regulatory reform aimed at enabling competition in local markets by establishing economically efficient prices. As the Department well knows, the process of regulatory reform is exceedingly complex. While the issues are interrelated, it has been logical, appropriate, and necessary to defer consideration of universal service and access reform until both wholesale rates and an alternative method of regulation for retail rates could be decided. With these issues now resolved, it is now the appropriate time to establish a state universal service fund combined with access charge reform, as the final pillar of regulatory reform necessary for economically efficient pricing and a fully competitive market, even in rural parts of the state. Accordingly, and as more fully discussed below, the Department's inquiry in this proceeding is both appropriate and necessary as a matter of law and public policy.

Argument

I. THE DEPARTMENT HAS THE LEGAL AUTHORITY TO ESTABLISH AN IN-STATE USF.

A. FEDERAL LAW EXPRESSLY LEAVES UNDISTURBED THE STATES' SOVEREIGN POWER TO ESTABLISH A UNIVERSAL SERVICE CHARGE AND SYSTEM.

In its *Notice*, the Department sought comment relative to whether the Department has sufficient legal authority under federal law to establish a USF.[2] There can be no doubt that the Commonwealth of Massachusetts may adopt USF regulations that are in addition to the federal USF regulations set forth in § 254 of the Communications Act of 1934, as amended ("Act"). Unless preempted by federal law, the Commonwealth has the sovereign power to establish a universal service fund and require customers of telecommunications carriers to pay into such fund. Nothing in federal law preempts that sovereign right. Indeed, Congress has made clear that the states may adopt regulations that advance universal service goals so long as such regulations are not inconsistent with the rules of the Federal Communication Commission ("FCC"). Section 254(f) of the Act states in pertinent part:

> A state may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides instate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that state.

Accordingly, the Congress has expressed its intent explicitly to leave to the states their authority to enact an in-state USF as contemplated by the Department in this proceeding, so long as the in-state USF is consistent with FCC regulations and imposes USF obligations on carriers in a competitively neutral and nondiscriminatory manner.

[2] *Notice*, at 2.

In addition, as the Department explains in its *Notice*, numerous other states have enacted in-state USF regulations akin to those that would ultimately be considered by the Department in a USF proceeding.[3] In fact, in AT&T's experience, over twenty-three (23) states have enacted such USF regulations, with a handful of additional states active contemplating the establishment of respective in-state USFs.

Consequently, the authority of the Commonwealth to enact an independent USF under federal law cannot reasonably be disputed.

B. THE DEPARTMENT HAS AUTHORITY UNDER STATE LAW TO A UNIVERSAL SERVICE FUND AND CHARGE.

1. The Department's Power To Establish A Universal Service Fund and Charge Derives From Its Plenary Authority To Regulate Telecommunications Carriers, Their Services and Their Rates.

In its *Notice*, the Department additionally sought comment on whether the Department has sufficient statutory authority under existing state statutes to establish a USF for the Commonwealth.[4] As explained below, the Department has been granted expansive authority to regulate telecommunications carriers and services in the Commonwealth pursuant to its enabling statute. More specifically, the Department has express authority to establish rates for the purpose of recovering the cost of telecommunications services. Nothing in that grant of authority restricts the Department's ability to set a rate that recovers a portion of the cost of local exchange service simply because the rate is labeled a USF charge. Accordingly, as discussed in more detail below, the Department has plenary authority to enact a USF as discussed in the *Notice*.

[3] *Notice*, at 2.

[4] *Notice*, at 2.

In general, it is well established Massachusetts law that an administrative agency established pursuant to statute has a wide range of discretion in establishing the scope of its authority pursuant to its enabling legislation.[5] The scope of authority is includes not only to those powers expressly conferred, but also those "necessarily implied" by the enabling legislation.[6] More significantly, where the exercise of a particular power is necessary to carry out the purposes expressed in a statute, a regulation may be authorized even where it cannot be traced to specific statutory language.[7] Accordingly, where the legislature has empowered the Department to regulate telecommunications in the Commonwealth, it may promulgate rules consistent with, and necessary to carry out the intent of, its enabling statutes.

The Department's authority to govern telecommunications includes M.G.L. c. 159 § 12, which broadly confers upon the Department, the authority to supervise and regulate telecommunications companies and services that are furnishing or rendering telecommunications services for public use.[8] Additionally, M.G.L. c. 25 § 12E½ establishes a division of telecommunications within the Department, stating that the telecommunications division "shall perform such functions… in relation to the administration, implementation, and enforcement of the Department's authority over the telecommunications industry "including, but not limited to, the authority granted by chapters 25, 30A, 159, and 166."

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[5] *See Brooks v. Architectural Barriers Board*, 14 Mass.App.Ct. 584, 588; 41 N.E.2d 549, 552 (Mass 1982).

[6] *See Altschuler v. Boston Rent Board*, 12 Mass..App.Ct 452, 461; 425 N.E.2d 781, 787 (Mass. 1981).

[7] *Id.*

[8] M.G.L. c. 159 § 12 provides: " The department shall, so far as may be necessary for the purpose of carrying out the provisions of law relative thereto, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth...

d) The transmission of intelligence within the commonwealth… by means of telephone lines or …other method or system of communication..."

Undoubtedly the authority granted to the Department under the above referenced enabling statutes is extensive. In fact, the authority that has thus been expressly granted to the Department includes the vast spectrum of telecommunications issues regulated in these chapters. These areas include, by way of example, Department regulation over: rates charged by telecommunications providers,[9] automatic telephone dialing systems,[10] residential telephone sales,[11] Enhanced 911 Service,[12] deaf and disabled persons and telecommunications equipment,[13] the construction of facilities including utility poles and underground construction,[14] pole attachments,[15] and 'slamming'.[16]

Consistent with the broad grant of authority to regulate telecommunications, the Court has held that deference should be given to the Department's expertise and experience in areas where the Legislature has delegated to it decision-making authority.[17] Accordingly, inherent in the express legislative grant of the authority to regulate telecommunications services is the liberal authority to promulgate regulations necessary to effectuate the legislative intent. In fact, Massachusetts law is clear that where an administrative department has been granted broad authority to effectuate legislative act, the validity of a regulation promulgated thereunder will be

[9] *See* M.G.L. c. 159 §§ 14, 19.

[10] *See* M.G.L. c. 159 §§ 19C, 19D.

[11] *See* M.G.L. c. 159 § 19E.

[12] *See* M.G.L. c. 166 § 14A.

[13] *See* M.G.L. c. 166 § 15E.

[14] *See* M.G.L. c. 166 § 22 *et. seq.*

[15] *See* M.G.L. c. 166 § 25A.

[16] *See* M.G.L. c. 93 § 108-113; M.G.L. c. 159 § 112E.

[17] *Attorney General v. Department of Telecommunications and Energy*, 438 Mass. 256, 267; 780 N.E.2d 33, 41-42 (Mass. 2002).

sustained so long as it is *reasonably related* to the purposes of the enabling legislation. [18] The Department has thus promulgated numerous regulations as an exercise of its inherent authority-even where there has been no express grant of authority on the respective telecommunications issue. By way of example, the Department's regulations on "residential Billing and Termination Practices," although not codified in the Code of Massachusetts Regulations, are nonetheless a comprehensive set of rules governing such telecommunications issues as billing and payment standards, security deposits and discontinuance of service, and arise out the Department's authority to regulate specific activities of telecommunications carriers even in the absence of express authority. [19]

2. The Department Has Long Exercised Its Authority To Set Rates Necessary To Fund Universal Service Goals.

Should the Department elect to initiate an investigation into instituting a USF, and a contemporaneous examination of the access fee regime, the Department would be acting under its ratemaking authority. As described *supra*, the Department has been granted express legislative authority to regulate the rates charged by telecommunications providers. Specifically, M.G.L. c. 159 confers upon the Department the power to ensure that rates are "just and reasonable,"[20] mandates that schedules of all rates and charges be filed with the Department,[21] and authorizes the Department to hold hearings with regard to scheduled and filed rates.[22]

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[18] *See Consolidated Cigar Corporation v. Department of Health*, 372 Mass. 844, 855; 364 N.E.2d 1202, 1210 (Mass. 1977).

[19] *See* D.P.U. 18448 (1997).

[20] *See* M.G.L c. 159 §§ 14, 17.

[21] *See* M.G.L. c. 159 § 19.

[22] *See* M.G.L. c. 159 § 20.

Consequently, the Department has ample authority to investigate and establish a USF under its express rate making powers.

Indeed, the Department has long established rates for the express purpose of achieving universal service goals. In its landmark decision, *IntraLATA Competition*, the Department established universal service as one of its rate-making goals.[23] In D.P.U. 89-300 (1990), the Department completed its investigation of New England Telephone's (now Verizon) rate structure guided by its six rate making goals, including universal service. In that case, the Department indicated that its goal of universal service meant that it would set rates so as to "ensure rates that allow basic telecommunications services to be obtained by the vast majority of the state's population."[24] In order to achieve this result, the Department – with the express intent of subsidizing residential rates – set the rates of other services above cost. [25] In its long history of establishing above cost rates that include a component needed to fund universal service requirements, it has never been found that the Department exceeded its authority. In short, the setting of rates required to fund universal service requirements has been a well established part of the Department's rate-making authority for decades.

Moreover, it should make no difference that a universal service "fund" is being considered for investigation and implementation in the present case. The Department has in effect established a "fund" for decades. In the past, the Department had set rates for certain services above-cost in order to provide funds to Verizon to be used to subsidize local exchange

[23] D.P.U. 1731 (1983).

[24] D.P.U. 89-300 (1990), at 11-12.

[25] *See*, D.P.U. 93-125 (1994), at 4 ("Traditionally, the pricing of telephone service was based on a method whereby residential monthly exchange rates were priced below cost in order to promote universal service; and long-distance, toll, and business rates were priced above cost in order to subsidize residential exchange rates.").

service. In effect, under the old system, the Department had established a fund for Verizon to manage and to use without any accountability. Indeed, it has long been recognized that under such a system, it was never known with any certainty whether the "extra" revenues that Verizon received were in fact needed and being used to subsidize local exchange rates. Certainly, if the Department had the authority to establish a fund for a private party to use for universal service purposes without any accountability, it has the authority to establish – *for the same public policy purpose* – a fund that is subject to public accountability.

The Department has broad authority to determine ratemaking matters in the public interest.[26] The Department has for years engaged in ratemaking necessary to achieve the important public policy objective of universal service. Clearly an investigation of the USF issues described by the Department in its *Notice* would further the same public interest the Department's historic ratemaking practices have sought to achieve.

3. Nothing In The SJC's Recent Decisions Is Contrary To The Department's Authority To Establish a Universal Service Fund and Charge.

Given that the Department has raised the question of its authority in this instance, it is important to distinguish the Supreme Judicial Court's decision in *Greater Boston Real Estate Board v. Department of Telecommunications and Energy.* In *Greater Boston Real Estate Board*, the Court held that a regulation promulgated by the Department exceeded the scope of its authority specifically delegated by the legislature and was thus *ultra vires* of the enabling regulation.[27] In that case, the Department had sought to promulgate regulations pertaining to

[26] *Attorney General v. Department of Telecommunications and Energy*, 438 Mass. 256, 267; 780 N.E.2d 33, 41-42 (Mass. 2002).

[27] *Greater Boston Real Estate Board v. Department of Telecommunications and Energy*, 438 Mass. 197, 779 N.E.2d 127 (Mass. 2002).

access rights-of-ways owned or controlled by the owners of buildings who were not otherwise involved in provision of traditional utility services. The Court determined that the proposed regulations effectively sought to regulate not only telecommunications service providers, but the recipients as well (*e.g.*, private land owners).[28] The court thus ruled that the Department sought to impose regulations on persons who were outside the class of persons that the legislature intended the Department to regulate.[29]

In the instant case, any universal service regulations would apply to the rates and charges that telecommunications carriers can place on their bills to retail customers. Unlike in *Greater Boston Real Estate Board*, the persons subject to the regulation, as well as the rate-making nature of the regulation, falls squarely within the core authority of the Department.

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For all of the foregoing reasons, the establishment of a USF fund and charge falls well within the authority granted by the Department's enabling statutes, consistent with state law.

II. THE DEPARTMENT SHOULD INVESTIGATE THE IMPLEMENTATION OF A COMPETITIVELY NEUTRAL USF, AND THE CONCOMMITANT RATIONALIZATION OF VERIZON'S RATE STRUCTURE TO MAKE IT CONSISTENT WITH THE DEVELOPMENT OF COMPETITION.

The Department has long recognized the perverse effects on the development of competition caused by a system of implicit subsidies for universal service and the concomitant above cost pricing of other services, such as access, to provide revenues that the incumbent claims are necessary to remain financially viable. Indeed, the Department recognized two different perverse effects. First, the Department understood that below cost pricing of local

[28] *Id.,* at 203; 132.

[29] *Id.*

exchange service by Verizon as the only carrier with access to above cost revenues from such services as exchange access would discourage other carriers from entering the market. Indeed, the Department has expressly contemplated the need to establish an explicit and "portable" subsidy (that is enjoyed by any carrier seeking to provide local exchange service), so as to avoid the disincentives for new carriers to invest in the local exchange market. In D.P.U./D.T.E. 94-185-C (September 1, 1998) (*"Local Competition Order"*), the Department stated:

> We are not prepared to further rebalance rates at this time in order to accommodate a price floor. The disincentive for facilities investment can be mitigated by a competitively-neutral universal service funding mechanism, which would provide support to carriers equal to the difference between the universal service price and the forward-looking cost of providing the services in question. The Department intends to investigate this and other universal service policies in a forthcoming docket.

The second perverse effect on competition that the Department recognized arises from the above cost pricing of monopoly inputs that generates the extra revenues that Verizon has claimed it needs to be financially viable when it cannot raise local exchange rates as high as it would like. In particular, the Department understood that above cost pricing for services required by Verizon's rivals in order to compete with Verizon was necessarily anticompetitive. The Department recognized that, with the elimination of the implicit subsidies, it would then be possible to price monopoly services required by Verizon's rivals, including access services, at incremental cost. In D.P.U. 93-125 (1994), the Department stated:

> Traditionally, the pricing of telephone service was based on a method whereby residential monthly exchange rates were priced below cost in order to promote universal service; and long distance, toll, and business rates were priced above cost in order to subsidize residential exchange rates. While this system succeeded in serving a social purpose, it was a pricing scheme not conducive to the development of a fully competitive market, in which the benefits associated with competition would be realized by all customers. . . With the endorsement of competition as the best way to achieve its policy goals of efficiency and fairness, it became necessary for the Department to confront the problems associated with the traditional policy of pricing services without direct regard to cost. The

> Department addressed the pricing issue in IntraLATA Competition [D.P.U. 1731], when it determined that ***"properly defined incremental costs should be used as the primary basis for pricing all services, including local exchange service***[.]"[30]

Access charges are of the most significant business costs incurred by CLECs that offer a bundle of local and long distance service in competition with Verizon. Thus, above cost access charges are inherently anticompetitive. As detrimental as such anticompetitive pricing is, the problems generated by above cost access prices go far beyond that. Above cost access pricing ultimately threatens the viability of the wireline network, because it drives consumers to by-pass the traditional wireline network to make toll calls, using for example wireless and voice over IP ("VOIP") technologies. The result undermines the traditional wireline network and potentially creates uneconomic bypass, inadvertently subsidizing alternative technologies that may not be competitive in their own right. Above cost access worked only as long as consumers had no way to by-pass it. Now that they do, another means of financing universal service requirements is needed. The Department's notice in this docket is timely. The Department should immediately move to establish a universal service mechanism to allow access to be priced at economically rational levels, which – as the Department has already recognized – means incremental cost.

While the USF and access reform issues were raised in D.T.E. 01-31, the Department deferred consideration of the issues at that time, but raised the prospect that the issues would soon be considered. In its *Notice,* the Department referred to its statement in D.T.E. 01-31 Phase II Order, where it stated that it

> "may, in a future docket, consider adoption of a universal funding mechanism to reduce the arbitrage opportunities and the price squeeze problems presented by the interaction of deaveraged wholesale prices and averaged retail prices."[31]

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[30] D.P.U. 93-125 at 4-5, quoting *IntraLATA Competition*, D.P.U. 1731, at (emphasis added).

[31] *Notice*, at 2; citing D.T.E. 01-31-Phase II Order at 83 (April 11, 2003).

This proceeding presents such an opportunity. The Department should open this investigation in this matter as a continuation of its long-standing commitment to economically efficient rate design, based upon universal service principles, that will encourage and sustain competition. This investigation would further advance the Department's goals by being competitively neutral in that the subsidy would be explicit and move with the customer. It would allow the Department to remove the market and investment distortions that are currently created by access. This will allow consumers to make rational purchasing decisions and will rationalize technology deployment.

The USF should be competitively neutral, and should allow access charges to come down to cost. The USF would need to include explicit identification of the amounts and sources of cross subsidy paid by each respective carrier. Accordingly, to the extent that any such carrier would receive the subsidy, such amounts could, for example, be removed from retail access rates.

The USF should be technologically neutral. In any investigation into an in-state USF, the Department must ensure that any requirement applies in a non-discriminatory basis to all technologies. The USF should not grant exclusions based upon different technologies (*e.g.*, wireless), but should, for example, apply to all telephone numbers to ensure that it is technologically, as well as competitively, neutral.

This investigation will further the Department's goals of enabling competition throughout the state, including rural areas. It is necessary to remove the access subsidy from the equation, and determine whether and how much additional funding is needed to cover the cost of local exchange service in rural parts of the state. If so, the subsidy should flow directly to consumers so that they can have a choice in their local provider.

Conclusion

For the reasons set forth above, the Department has the authority to implement a competitively neutral method of achieving universal service through the establishment of a universal service fund and charge and should move forward immediately to do so in this docket.

Respectfully submitted,

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